No. 86-1656

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

UTAH POWER & LIGHT COMPANY, APPELLANT

v.

IDAHO PUBLIC UTILITIES COMMISSION, ET AL.

ON APPEAL FROM THE SUPREME COURT OF IDAHO

MOTION TO DISMISS

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QUESTION PRESENTED

Whether appellant, an electric utility company that has a certificate of public convenience and necessity authorizing the delivery of energy in a geographic area that includes a United States Department of Energy (DOE) facility, was deprived of its rights under the Fifth and Fourteenth Amendments by the Idaho Public Utilities Commission's determination that a second utility company is also authorized to supply energy to the DOE facility and that the second utility—which is now satisfactorily serving the DOE facility—has the right to continue to provide that service.

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MOTION TO DISMISS

The Solicitor General, on behalf of the United States Department of Energy, moves pursuant to Rule 16.1 of the Rules of this Court that this appeal be dismissed for want of jurisdiction.

OPINIONS BELOW

The opinion of the Supreme Court of Idaho (J.S. App. 1a-25a) is reported at 112 Idaho 10 and 730 P.2d 930. The opinion of the Idaho Public Utilities Commission (J.S. App. 30a-56a) is unreported.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on November 26, 1986. A petition for re-

hearing was denied on January 16, 1987 (J.S. App. 26a-27a). The notice of appeal (J.S. App. 61a-64a) was filed on April 13, 1987, and the appeal was docketed on April 15, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

STATEMENT

1. Since 1949, the Department of Energy (DOE)[1] has owned and operated, directly or through contractors, the Idaho National Engineering Laboratory (INEL). The INEL is a 900-square-mile nuclear research facility located in five counties in southeastern Idaho.[2] Electric service in that area of Idaho was first provided by appellant, a utility company authorized to provide such service under Idaho law. During the 1940s, appellant was the exclusive supplier of electricity to the Naval Proving Grounds, the federal facility that preceded the INEL. Appellant also provided electric power to the INEL during the first year of the laboratory's existence. J.S. App. 2a, 35a-36a.

In 1950, DOE, appellant, and appellee Idaho Power Company (IPC), with the approval of the Idaho Public Utilities Commission (IPUC), entered into a three-party agreement for the provision of electric service to the INEL. Under that agreement, which designated DOE as " 'buyer,' " IPC as " 'seller,' " and appellant as " 'a party of the second part' " (J.S. App. 2a), IPC agreed to " 'supply or stand ready to

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[1] References to the Department of Energy include its predecessor agencies, the Atomic Energy Commission and the Energy Research and Development Administration.

[2] The state supreme court erroneously stated that the facility occupied 980 square miles.

supply[] the full amount of [DOE's] power requirements,' " up to 20,000 kilowatts, and appellant agreed "to construct and maintain a 132 KV transmission line" to deliver the electricity (*id.* at 35a). In a separate two-party agreement, IPC and appellant established a " 'pool account' " into which DOE's payments for their respective services were deposited by IPC and from which the utilities withdrew periodic disbursements. J.S. App. 3a, 35a.

In 1957, the three-party-agreement was amended to provide for DOE's increased power requirements. The amended agreement stated that " '[s]eller (Idaho Power), in cooperation with [appellant] shall sell and deliver to buyer * * * all electric power required by buyer * * * up to 40,000 kw' " (J.S. App. 35a-36a). The two-party agreement between IPC and appellant was amended at the same time to reflect the increased power requirements (*id.* at 3a, 36a).[3]

During the first 19 years that the three-party agreements were in effect, both IPC and appellant had certificates of public convenience and necessity authorizing the provision of electric service in four of the five counties in which the INEL is located. Only appellant had a certificate of public convenience and necessity to supply electric service to customers in Butte County. In 1969, IPC obtained a certificate of public convenience and necessity for Butte County from the Idaho Public Utilities Commission. The cer-

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[3] Appellant has provided less than two percent of the electricity supplied to the INEL under these agreements; it has, however, supplied "standby capacity" (J.S. App. 3a). Since 1978, all of the electricity supplied to the INEL has been generated by IPC (*ibid.*).

tificate stated that it was " 'limited to the transmission, interchange and supply of high voltage electric power and energy.' " J.S. App. 3a; see also *id.* at 53a-56a.

2. On January 30, 1985, the Department of Energy petitioned the Idaho Public Utilities Commission for a declaratory ruling that IPC would have the right to be sole supplier of electricity to the INEL upon termination of the three-party agreement. Following "extensive discovery," "direct and rebuttal testimon[y]," and a public hearing, the Commission granted the DOE petition (J.S. App. 30a-52a).

The Commission rejected appellant's contention that IPC had no authority to serve customers in Butte County because the 1969 certificate of public convenience and necessity simply granted IPC the authority to construct and maintain a transmission line across the county. The Commission stated that "[w]hile Idaho Power's certificate gave it no general grant of authority to serve all customers in Butte County, it nevertheless allowed it to *supply* power and energy at the transmission level, and there was one customer for whose benefit this was obviously done: DOE" (J.S. App. 46a (emphasis in original)). The Commission found that IPC in 1969 obtained "a valid Certificate of Public Convenience and Necessity to serve customers in Butte County at transmission levels" and that IPC "is currently *serving* the entire DOE load" (*id.* at 49a (emphasis in original)). "When two utilities, both of whom have the legal right to serve a particular area, are vying to serve that area," the Commission stated, "the utility that is currently and satisfactorily serving the disputed area may continue to do so" (*ibid.*). The Commission

concluded that IPC had the right to continue to serve the DOE facility.[4]

3. The Idaho Supreme Court upheld the Commission's determination by a divided vote (J.S. App. 1a-25a). The majority rejected appellant's argument that a state statute designed to prevent " 'pirating' away of customers of competing utilities" precluded IPC from serving the DOE facility without first obtaining appellant's consent (*id.* at 7a). That argument was unavailing "in this unique factual situation," the court held, because the present case involves "delivery to a special contract customer (DOE) in a situation where both utilities had authority to deliver energy * * * and [,] more importantly, where there is a history * * * show[ing] that Idaho Power was, and has been for a long number of years, the primary supplier of the energy to DOE" (*id.* at 7a-8a).

The court also held that the Commission's decision that IPC is entitled to serve DOE upon the termination of the three-party agreement is "supported by substantial and competent evidence and [that] there has been demonstrated no clear abuse of discretion" (J.S. App. 10a). "There is ample evidence in the record," the court concluded, to sustain the Commission's finding that IPC's certificate of convenience and necessity permits it "to *supply* the power and energy at *transmission* level for the benefit of one customer—DOE" (*id.* at 9a (emphasis in original)).

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[4] The Commission also found (J.S. App. 50a) that the public interest weighed in favor of allowing IPC to be the sole supplier of power to the INEL. It did not rest its decision on that finding, however, because it concluded that IPC's "right to serve DOE" is clear "regardless of public interest considerations" (*id.* at 48a).

And "the commission correctly decided that, as between two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so" (*ibid.*).[5]

Justice Bakes dissented (J.S. App. 11a-25a). Like the majority, he viewed the facts in this case as "somewhat unique" (*id.* at 13a). He concluded, however, that the Commission's factual findings "are not supported by substantial competent evidence" (*id.* at 25a). In Justice Bakes' view, IPC's certificate of public convenience and necessity did not authorize IPC to provide power to the DOE facility (*id.* at 20a-25a).

Justice Bakes further concluded that the majority's interpretation of IPC's certificate indicated that appellant had been deprived of its right to procedural due process when that certificate was granted in 1969. He stated that appellant was entitled to notice that IPC intended to serve " 'customers in Butte County' " before appellant's right to serve those customers was limited by the grant of a certificate to IPC, and that appellant had not been provided with such notice. J.S. App. 19a. Finally, he found that "due to the lack of support in the record" the Commission's substantive decision was "arbitrary and erroneous as a matter of law, and a *per se* * * * violation of substantive due process. * * * The IPUC's order clearly has deprived [appellant] of its property without due process of law and should be reversed" (*id.* at 20a).

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[5] The court also rejected appellant's argument that the IPUC lacked jurisdiction to issue a declaratory ruling, reasoning that the dispute in this case essentially involves contractual rights that may appropriately be determined " 'before or after there has been a breach' " (J.S. App. 4a).

ARGUMENT

1. a. Appellant seeks to invoke this Court's appellate jurisdiction under 28 U.S.C. 1257(2), which provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court * * * [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." Appellant states that "State public utilities commission orders issued under delegated authority are 'state statutes' for purposes of 28 U.S.C. § 1257(2)" (J.S. 2-3).

Appellant is simply wrong in its view that this Court's mandatory jurisdiction may be invoked in every case in which an order of a public utilities commission is challenged on federal constitutional grounds and the state supreme court sustains the order. It is "the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, [that] is decisive of the question of jurisdiction" (*Lathrop* v. *Donohue*, 367 U.S. 820, 824 (1961) (plurality opinion)). Only orders of state regulatory commissions that are "made in the exercise of delegated *legislative* authority" are "statute[s] of the State in the sense of the jurisdictional provision" (*King Manufacturing Co.* v. *City Council*, 277 U.S. 100, 112 (1928) (emphasis added)).[6] Accordingly, an appeal to this Court will

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[6] All of the decisions cited by appellant in support of its jurisdictional claim involve legislative rules issued by state regulatory commissions. See *Atchison, T. & S.F. Ry.* v. *Public Utilities Comm'n*, 346 U.S. 346 (1953); *Lake Erie & W.*

lie only if an order of a public utilities commission sustained by a state court has "the characteristics of legislation." *Lathrop* v. *Donohue*, 367 U.S. at 827 (plurality opinion); see also R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 110 (6th ed. 1986).

The order of the Idaho Public Utilities Commission affirmed by the Idaho Supreme Court is plainly adjudicatory, not legislative. The Commission did not seek to regulate by promulgating rules to govern the conduct of those subject to its power; instead the Commission's order "disposed of * * * litigation between parties." *Lathrop* v. *Donohue*, 367 U.S. at 827 (plurality opinion); see also *King Manufacturing Co.* v. *City Council*, 277 U.S. at 104; *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). The Commission's jurisdiction was invoked by a petition for a declaratory ruling and, following an adversary proceeding, the Commission issued an order providing that "upon the termination of the three-party contract * * * [IPC] shall have the right to continue to serve [DOE]" (J.S. App. 51a).

Both the majority and dissenting opinions in the state supreme court noted that "[t]his is not the ordinary public utilities case," but instead resembles a "contract dispute." J.S. App. 14a; see also *id.* at 4a. Indeed, the "central issue" (*id.* at 8a) before the state supreme court—whether the findings upon which the Commission's judgment is based are "supported by substantial evidence" (*ibid.*) or whether they are "clearly erroneous" (*id.* at 17a)—under-

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R.R. v. *Public Utilities Comm'n*, 249 U.S. 422 (1919); *Williams* v. *Bruffy*, 96 U.S. 176 (1877).

scores the quintessentially adjudicatory nature of this dispute. Cf. *Lerner* v. *Casey*, 357 U.S. 468, 473 (1958) (an appeal does not lie where "the constitutional questions before us relate primarily, and more substantially, to the propriety of the findings made by [a state agency] rather than to the validity of the provisions of the [law under which it acted]").

b. Moreover, even if an appeal would otherwise lie in this case, no "substantial federal question" was "timely or properly raised" in the proceedings below (Sup. Ct. R. 16.1(b)). This clearly was the perception of four of the five Justices of the state supreme court, who did not even mention the alleged constitutional ramifications of the Commission's decision. See *Fuller* v. *Oregon*, 417 U.S. 40, 50 n.11 (1974) (failure of state court to address alleged constitutional question creates a presumption that the question was not properly raised).

Appellant's attempts (J.S. 9-10; J.S. App. 67a-71a) to find intimations in the record of the presentation of a constitutional question fall woefully short of showing that a constitutional claim was presented "with sufficient definiteness * * * to say that the court's attention was challenged thereto" (*Live Oak Water Users' Ass'n* v. *Railroad Comm'n*, 269 U.S. 354, 357 (1926)). Rather, it is apparent that no constitutional claims were "thoroughly discussed" until they were raised by the dissenting Justice below (J.S. 10 n.6). Indeed, before the dissent suggested otherwise, appellant *conceded* that it had "no complaint that its procedural due process rights have been violated" (Idaho Sup. Ct. Reply Br. 26). For the foregoing reasons, the appeal should be dismissed.

2. Treating the jurisdictional statement as a petition for a writ of certiorari (see 28 U.S.C. 2103),

the petition should be denied. The decision of the Idaho Supreme Court is entirely factbound. As both the majority and dissent below pointed out, the facts of this case are "unique" (J.S. App. 7a, 13a); because of "the peculiarities of the situation" involved (*id.* at 9a), "[t]his is not the ordinary public utilities case" (*id.* at 14a). Moreover, despite appellant's efforts to dress its challenge to the Idaho Supreme Court's construction of state law in constitutional garb, appellant has failed to present an issue that comes close to warranting this Court's review.[7]

a. The starting point in this case is the determination of both tribunals below that IPC's certificate of public convenience and necessity confers upon IPC the right to serve the Department of Energy facility (see J.S. App. 9a, 46a). Appellant contends that these decisions are wrong, that Idaho law actually conferred upon *appellant* a property right to continue to serve the DOE facility, and that the decisions below effect a deprivation of that property right in violation of both procedural and substantive due process protections.

As a threshold matter, the interpretation of IPC's certificate is a question of state law on which the Idaho Supreme Court's decision is dispositive. And while this Court obviously is free to consider for itself whether appellant had a property interest that was affected by the IPC certificate, the state's highest court's interpretation of appellant's interest should not lightly be cast aside. See *Hughes* v. *Washington*, 389 U.S. 290, 296-297 (1967) (Stewart, J.,

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[7] Appellant's failure to raise the constitutional claims properly in the court below also weighs strongly against review under this Court's certiorari jurisdiction.

concurring) (deference to state court determination appropriate unless that determination "worked an unpredictable change in state law"). There is no basis for rejecting the Idaho Supreme Court's conclusion on this record.

Appellant has pointed to nothing in Idaho law that confers upon it the sole right to provide electricity to the DOE facility. Such a property right would presumably be founded upon a provision of state law barring the Commission from granting overlapping certificates of public convenience and necessity, or permitting overlapping certificates in only limited circumstances. But the Commission's governing statute provides that the Commission may "attach to the exercise of the rights granted by [a certificate of public convenience and necessity], such terms and conditions as in its judgment the public convenience and necessity may require." Idaho Code § 61-528 (1976); see also Idaho Code § 61-526 (1976) (authorizing the Commission to act in a manner that is "just and reasonable" in the event of a conflict between two utilities). No mention is made of any requirement to grant exclusive service rights.[8]

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[8] Appellant relies (J.S. 14-15) upon *Cambridge Telephone Co.* v. *Pine Telephone System, Inc.*, 109 Idaho 875, 712 P.2d 576 (1985), in which the Idaho Supreme Court held that a certificate previously issued for an unserved area could be revoked—and authority to serve that area awarded to another utility—if the Commission acted before the first utility began to extend its service to the area in question (109 Idaho at 879 & n.2, 712 P.2d at 580 & n.2). *Cambridge Telephone* is inapposite here because the Commission did not revoke appellant's certificate; it simply held that (1) a certificate could be issued to IPC in respect of the service to DOE *that IPC already was providing*, and (2) where two utilities have authority to serve the same customer, the customer should be

The record of this case makes clear that overlapping authority is not unprecedented: appellant and IPC both have certificates of public convenience and necessity granting general authority for the provision of electric service in four Idaho counties (see J.S. App. 42a-43a). Appellant has failed to show that Idaho law limited the Commission's authority to issue another certificate authorizing service to the DOE facility if it found that the public convenience and necessity supported that action, especially in view of the fact that IPC was already providing the very service authorized by the certificate. There is accordingly no reason to think that the Commission's decision to issue such a certificate to IPC infringed any property right of appellant.

Second, appellant has not shown any basis for disagreement with the Idaho Supreme Court's conclusion that, as between IPC and appellant, IPC has the right to provide service to the DOE facility. The court quite reasonably concluded that where there are "two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so" (J.S. App. 9a).[9]

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served by the utility that is already in fact providing service to the customer.

The other Idaho decisions cited by appellant (J.S. 20) similarly do not announce any rule indicating that these actions were improper in the circumstances of this case. Appellant also cites (J.S. 16-18) a number of decisions by courts of other states dealing with revocation of certificates. Those decisions are irrelevant because the question here is one of Idaho law.

[9] Even if the decisions of the state tribunals infringed upon a property interest created by state law, moreover, the judg-

b. The Commission noted that "the public interest factors weigh heavily in favor of" permitting IPC to serve the DOE facility, because of "the cost to Idaho ratepayers of not allowing Idaho Power to continue to be the sole supplier" (J.S. App. 48a). The Commission did not rest its decision on that ground because IPC's certificate already gave IPC the right to provide that service. However, this potential alternate basis for the Commission's decision in favor of IPC indicates that reversal of the decision below by this Court might not affect the actual outcome of this case.

c. Wholly apart from the merits, appellant has presented no reason why review by this Court is appropriate. As we have discussed, both the majority and dissenting opinions below stress the fact bound nature of appellant's claims. This case involves unusual questions concerning the method of selecting the utility company that is entitled to serve a single large

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ment below might be supported on the ground that there is no constitutional violation. With respect to the claimed violation of procedural due process, appellant does not assert that it did not receive notice of the 1969 proceeding that culminated in the issuance of the IPC certificate of public convenience and necessity, it claims only that that notice was inadequate. Notice of the pendency of the proceeding was indisputably all that the Constitution requires; an interested party need not be informed of all possible consequences of that proceeding in order to receive due process. With respect to the substantive due process claim—the assertion that the Commission's action amounted to a taking—appellant may not have suffered an "interference with reasonable investment-backed expectations" sufficient to amount to a violation of the Fifth Amendment because appellant has not actually supplied any power to DOE since 1978 (*PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980)).

customer where service previously was provided by two utility companies acting in concert. There is no reason for this Court to review the determinations of the state commission and the Idaho Supreme Court.

CONCLUSION

The appeal should be dismissed for want of jurisdiction. Treating the jurisdictional statement as a petition for a writ of certiorari, the petition should be denied.

CHARLES FRIED
Solicitor General

JULY 1987

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